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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 351

ANNA M. SCHULZ, MARIE S. HARTLEY, PAUL R. SCHULZ, ET AL.,

Petitioners,

vs.

DOROTHY V. FLORA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT, AND BRIEF IN SUPPORT THEREOF.

ROBERT RUPPIN,
Counsel for Petitioners.

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Petitioners,

vs.

DOROTHY V. FLORA

PETITION FOR ALLOWANCE OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable the Chief Justice and the Associate Justices of the said Court:

Anna M. Schulz, Marie S. Hartley, Paul R. Schulz, Janet L. Hoffman, Edwin J. Schulz, Jr., Bertha D. Hurst and James E. Schulz respectfully petition the Court to grant a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania rendered in the matter of the Estate of Max Schulz, Deceased, to No. 195, January Term, 1953 in that Court, wherein petitioners were appellees and Dorothy V. Flora, Respondent, was appellant, which reversed a judgment of the Superior Court of Pennsylvania to No. 125, October Term, 1952, which judgment of the Superior

Court affirmed a decree of the Orphans Court of Lancaster County, Pennsylvania, entered to No. 46, June Term, 1917, and in support of their petition set forth the following:

I. Statement of the Matter Involved

Testator died in 1917, a resident of Lancaster County, Pennsylvania. His will directed his executor to sell his real estate and divide the proceeds into seven equal parts—one each to six of his children, of whom petitioners' ancestor was one, the ancestor being also the executor. The seventh part he gave the executor in trust, for a seventh son for life and at his death to that son's children. The executor did not sell the land, but in 1920 five of the children and the life beneficiary joined in a deed to the executor for the land and gave him a release. The deed recited that "by arrangement among all of the parties hereto it has been agreed to execute this conveyance so that the said Edwin J. Schulz the grantee herein shall have an absolute fee simple title in the premises free and discharged of all claims whatsoever which any of the parties hereto might or could have in the said real estate". The release recited "we and each of us have this day had and received of and from Edwin J. Schulz executor of the last will and Testament of Maximillian Schulz deceased full satisfaction and payment of our and each of our shares in the personal estate of Maximillian Schulz deceased as appeared to be due us and each of us by a separate account or statement submitted to us this day by the said Edwin J. Schulz showing his administration of the estate of our deceased father the said Maximillian Schulz which account we have examined and with which we are entirely satisfied". The deed and release were recorded in 1920. The life beneficiary's seven children, of whom five were then under age, did not join in the deed. The respondent here, who is the youngest of those children, came of age in 1930. In 1921 one of the testator's children

petitioned the Orphans Court of Lancaster County for a citation on the executor to file an account. After an answer, replication and hearing, that Court held the estate had been settled out of Court and dismissed the petition. Nothing further was done until 1951. The executor had died in 1941, intestate, leaving the petitioners here as his heirs. The life beneficiary died in 1943. In 1938 the executor-trustee had filed a trust account of a one-seventh share of the proceeds of the land, as fixed by the deed, showing payments of income to the life beneficiary. The executor and his heirs have been in continuous, exclusive possession of the real estate since 1920. In 1951 one of the life beneficiary's children petitioned the Orphans Court, under a Pennsylvania Statute requiring that Court's approval where more than twenty-one years had elapsed since the testator's death, (Act of March 15, 1832, P. L. 135) for appointment of an administrator *d.b.n.c.t.a.* to file an account and to sell testator's real estate. Respondent here joined in that petition. An answer was filed setting up the conveyance by the six children to the executor and a sale of the remaining one-seventh interest by the executor to himself, the setting up of a trust of one-seventh of the agreed purchase price for the life beneficiary and the payment of the income thereof to him during the life of the executor, the knowledge and acquiescence in this arrangement by the petitioners for periods of not less than twenty-one years after attaining their majorities and their inactivity for ten years after the executor's and eight years after the life tenant's death, and consequent laches. Preliminary objections to the answer, in the nature of a demurrer, were filed. The Orphans Court, without disposing of the objections, dismissed the petition for laches appearing on its face. The original petitioner took an appeal to the Superior Court of Pennsylvania. That appeal was abandoned. Later the present respondent appealed.

The Superior Court unanimously affirmed the judgment. The Supreme Court of Pennsylvania allowed an appeal. Appellant there abandoned its position that an administrator should be appointed to file an account, but pressed its contention that one should be appointed to sell the real estate. The Supreme Court reversed the Superior Court, and in a sweeping opinion directed the Orphans Court to appoint an administrator to sell the real estate. Instead of awarding a *procedendo,* the Supreme Court went far beyond the issues presented by the appeal and decided the case on the merits, without according petitioners a chance to be heard in a plenary hearing, without allowing them leave to amend their answer, as required by the Pennsylvania Procedural Rules and that Court's own decisions, and assumed the truth of the averments of the petition, notwithstanding some of them were denied by the petitioners. A petition for reargument on these grounds was denied without opinion. The record was returned to the Orphans Court.

II. The Basis of the Court's Jurisdiction

It is contended that the judgment of the Supreme Court of Pennsylvania directing real estate to be sold which petitioners and their ancestor had occupied under a claim of right for thirty-one years without affording them an opportunity to take testimony or to cross-examine the evidence of the petitioners and without allowing them an opportunity to amend their answer, when the only question actually presented by the appeal was whether the Orphans Court had abused its discretion in dismissing the petition for laches, was a taking of petitioners' property without due process of law.

III. The Question Presented

Is it a violation of the due process clause of the Fourteenth Amendment for a state court of last resort to enter

an order on appeal, directing appointment of an administrator to sell real estate which has been in possession of respondents under a claim of right for thirty-one years, where the petitioners' right to have it sold is resisted, where the petition had been dismissed by the Court of first instance and the only question presented on appeal was whether the petition had been rightfully dismissed for laches, and where no *procedendo* was awarded and no opportunity afforded to the respondent to be heard in a plenary hearing or to amend the answer filed, as required by the state law?

IV. The Reasons Relied On for the Allowance of the Writ

This is a particularly arresting case, not only of hardship, but of gross injustice to the petitioners. When the appeal was argued before the Supreme Court of Pennsylvania, the only question actually involved was, Had the Orphans Court abused its discretion in dismissing a petition for the appointment of an administrator under the local Statute for the purpose of selling testator's real estate because of laches appearing on the face of the petition? The case was argued on this basis in the Superior Court, which affirmed the decision. It was argued on the same basis in the Supreme Court. That Court, however, not only decided that the petition should not have been dismissed for laches, but directed that it should be granted, that an administrator should be appointed and that testator's real estate should be sold under the will. It did this, notwithstanding the allegations of knowledge in the answer and the allegations of a sale of the questioned interest by the executor to himself thirty-one years previously, of possession by the executor since then, of the setting up of the proceeds of the one-seventh share as a trust fund, of the payment of the income of the fund to the life tenant, father of the respondent, during the executor's life, and the acquiescence of the re-

spondent in that arrangement. It not only assumed the truth of the petition, but failed to afford petitioners the opportunity of amending their answer, to which they were entitled under the Pennsylvania law. The only question raised by the appeal was the propriety of dismissing the petition for laches. The Supreme Court, in effect, sustained the preliminary objections to the answer and entered a final decree, although by its own practice and decisions such a decision is only interlocutory, and the only order which can be entered on it is one requiring the respondent to amend. The petitioners were taken completely by surprise at the scope of the decision and immediately filed a petition for reargument, which was denied without opinion.

It is realized that this application does not come strictly within the scope of the statement of reasons for which certiorari will ordinarily be granted, but it is a case in which a State court of last resort has abused its powers and acted to take away property which petitioners claim, without affording them an opportunity to maintain their right to it in a plenary trial. Unless this Court will grant relief, petitioners will suffer the deprivation of their property without any semblance of due process.

Accompanying this Petition are submitted:

1. A transcript of the record.
2. Petitioners' Brief.

WHEREFORE your petitioners pray that a writ of certiorari may be issued to review the judgment of the Supreme Court of Pennsylvania rendered in this matter, and petitioners further pray that a stay of all proceedings herein be awarded by this Court until either a writ of certiorari be refused or until final disposition of the case in this Court, if a writ of certiorari be granted.

ROBERT RUPPIN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONERS

The Statute of Pennsylvania under which the original Petition was filed—the Act of March 15, 1832, P. L. 135—transferred authority to grant letters of administration from the Register of Wills to the Orphans Court where more than twenty-one years had elapsed since the decedent's death. In effect it transformed this from a ministerial to a judicial function. The granting of letters by the Orphans Court was discretionary. *Hanbest's Estates,* 21 Super. 427 (1902); *Treat's Estate,* 341 Pa. 342; 19 At. 2nd 354 (1941).

In this case letters were denied on the ground of laches. This was done on the authority of *Badger* v. *Badger,* 2

Wallace 87 (1864) and *Grange National Bank* v. *First National Bank,* 330 Pa. 1; 198 At. 321 (1938). The only question possibly involved on appeal was whether this denial was an abuse of discretion.

Preliminary objections had been filed to the answer, in the nature of a general demurrer. These had been considered by the Court of first instance, but not decided in view of the actual disposition of the case there. They had not been argued on appeal, as the disposition of such objections is an interlocutory matter. The Supreme Court of Pennsylvania, however, without specifically mentioning or disposing of these objections, decided the case on the merits, as if sustaining the objections which went to the sufficiency of the answer. By the Pennsylvania Rules of Civil Procedure (Rule 1028 (e), as construed by the Supreme Court itself in *Weinberg* v. *State Workmen's Insurance Fund,* 368 Pa. 76, 81 At. 2nd 906, at 909 (1951), when preliminary objections are sustained, the party against whom the decision is rendered must have leave to amend. See also *Gast* v. *Engel,* 369 Pa. 132; 85 At. 2nd 403 (1952); *Gray* v. *Phila. & Reading Coal & Iron Co.,* 286 Pa. 11; 132 At. 820 (1926), and *3 Std. Pennsylvania Practice (Revised),* Sec. 11, P. 669. This was pointed out to the Court on a petition for reargument filed after the decision was rendered, but this petition was denied without opinion.

There are allegations in the petition which were denied. The present petitioners, it is submitted, were entitled to proof of such allegations and to cross-examine the evidence of the petitioners in support of them. The Supreme Court, however, took them as true instead of following the time-honored rule, on demurrer, of taking the well-pleaded allegations of the answer as true and all the allegations of the petition as unproved. *Condel* v. *Savo,* 350 Pa. 350; 39 At. 2nd 51 (1944).

The question of the Statute of Limitations was ignored by the Supreme Court, although clearly raised by the answer. It has been held time and again that the Statute runs against a cestui que trust where the trustee openly denies the cestui's right. *Walker* v. *Walker,* 16 S. & R. (Pa.) 379 (1827); *Taylor* v. *Holmes,* 14 Fed. 498, Western Dist. N. C. (1882). The petitioners here were in effect not permitted to defend on this ground.

The merits of this case depend on elementary principles ignored or misapplied by the Court below. They will not be discussed because the only question involved here is one of due process.

Petitioners going up on appeal on the sole question of whether the petition was properly dismissed for laches were confronted with a decision of the whole controversy on the merits, without an opportunity to defend against the petition and to present their case in court. As a result, property which they thought they owned and of which they had been in possession under a claim of right for thirty-one years before the filing of the petition, will be taken from them unless the decision of the Supreme Court of Pennsylvania be reversed by this Court and the case sent back with a *procedendo.*

Cases of this kind are necessarily rare and no case closely resembling this one has been found. Cases need not be cited, of course, to show that a judicial decision of a State court, as well as a Statute, may constitute denial of due process. Most of the applicable decisions lie in the field of Criminal Law and procedure and of the so-called "civil rights". Perhaps the dictum in the case of *Campbell* v. *Holt,* 115 U. S. 623 (1885) is as close as any. There it was said that a Statute removing the bar of the Statute of Limitations after the bar became perfect was a deprivation of due

process. If a Statute having that effect denies due process, so must a judicial decision which has the same effect. It is submitted that the decision of the Supreme Court of Pennsylvania in this case was such a decision.

Respectfully submitted,

ROBERT RUPPIN,
Counsel for Petitioners.

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